

NO. 66377-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
SEP 26 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RASHID A. HASSAN,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
2011 SEP 26 PM 4:05

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge  
The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial court deprived the appellant, Rashid A. Hassan, of his constitutional right to represent himself.

Issue Pertaining to Assignment of Error

Did the trial court violate Hassan's constitutional right to represent himself, as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution, by denying his unequivocal motion to proceed pro se, made three weeks before his scheduled trial date, especially where he did not request additional time to prepare for trial?

B. STATEMENT OF THE CASE

On June 21, 2010, the state filed an information charging Rashid A. Hassan with possession of cocaine with intent to deliver. CP 1. Appointed counsel entered her appearance June 25. Supp. CP \_\_ (sub. no. 3, Notice of Appearance, filed 6/25/2010). That counsel was later permitted to withdraw due to a conflict and new counsel was appointed. Supp. CP \_\_ (sub. no. 7, Order to Hold Case Scheduling Hearing, filed 7/14/2010); Supp. CP \_\_ (sub. no. 9, Notice of Appearance, filed 7/15/2010); RP (8/3/10) 4-5.

Hassan moved to discharge the new counsel on August 3, explaining counsel had been "dishonest," disagreed with him about filing a

mistrial motion in another case, "had her own ideas" was "having attitude again." RP (8/3/10) 4. He asserted counsel had a conflict of interest because she did not believe him and because "she's disagreeing with me about everything." RP (8/3/10) 5-6. The court denied the motion to discharge counsel and advised Hassan to work with counsel. CP 5; RP (8/3/10) 6.

Hassan renewed his motion September 8 before a different judge. When the court announced it was going to deny the motion, Hassan said, "I rather go pro se, your Honor." RP (9/8/10) 4-5. The court told Hassan he had "the right to do so." RP (9/8/10) 5. The following exchange occurred:

THE COURT: Do you understand that you do have the constitutional right to a lawyer?

DEFENDANT HASSAN: This is not a constitutional right. She's entire against me, your Honor.

THE COURT: Do you understand that you have the constitutional right to a lawyer?

DEFENDANT HASSAN: Not to her, your Honor, not her. Not her. Not her. Not this kind of attorney. It's against my constitutional rights.

THE COURT: You're not answering my question, sir. Do you understand that you have a constitutional right to a lawyer who can be provided to you at no expense to you?

DEFENDANT HASSAN: I don't, not like her.

THE COURT: Then I won't allow you to proceed pro se. Thank you.

DEFENDANT HASSAN: This is ridiculous.

RP (9/8/10). The court signed an order denying Hassan's motion to discharge counsel as well as his motion to proceed pro se. The court denied the latter request because Hassan "does not understand that he has the right to a lawyer." CP 6.

The case was called for trial October 4 before yet another judge, who was the assigned trial judge. The prosecutor requested that the judge revisit Hassan's September 8 request to proceed pro se because of a concern the judge at the previous hearing did not engage in a thorough enough colloquy to make the record clear. RP (10/4/10) at 5-6. The trial judge therefore asked Hassan whether he was persisting in his request to represent himself. This triggered the following exchange:

THE DEFENDANT: I have in the past. My and my attorney, we were having differences in terms of strategy, of court strategy. Witnesses. I have witnesses . . . that were present at the time of my arrest, and there have been also previous contact with this officer who arrested me who is racist and pushed me to the ground. And . . . there is all those witnesses haven't been contacted, your Honor. And so I'm coming here with the mercy of the State. . . . I don't see how I'm going to have chance for my case to be, you know, fair trial.

THE COURT: Okay. But you are not asking to represent yourself, to be your own lawyer; is that correct?

THE DEFENDANT: Your Honor, I have in the past and, you know, and it's – it would be hard, I know. It's, you know – but also I like – you know, I would like a fair trial where my own witnesses are present. That's what I'm asking for the Court.

THE COURT: Okay. So it sounds like there may be a difference of opinion between you and the defense counsel regarding trial strategy, is that right?

THE DEFENDANT: Yeah.

RP (10/4/10) 6-7.

After defense counsel declined to add anything, the court stated,

There's not a motion before the Court to – for you to request pro se. So I won't address this issue, and I understand that you've done that in the past, and it was difficult and that is certainly true. It's very, very difficult to represent yourself in a criminal trial. So at this point we will go forward.

RP (10/4/10) 7.

The case proceeded and Hassan waived his right to a jury trial. CP 14; RP (10/4/10) 90-99. The trial judge ultimately found Hassan not guilty of possession of cocaine with intent to deliver and guilty of the lesser offense of possession of cocaine. CP 32-35; RP (10/6/10). The court imposed an 18-month standard range sentence followed by 12 months community custody. CP 37-46.

C. ARGUMENT

THE TRIAL COURT VIOLATED HASSAN'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF BY DENYING HIS UNEQUIVOCAL REQUEST WITHOUT FIRST ENGAGING IN A SUFFICIENT COLLOQUY.

A criminal defendant has a constitutional right to self-representation. U.S. Const., amend. VI and XIV; Wash. Const., art. I § 22. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), review denied, 151 Wn.2d 1027 (2004). The state constitutional right is absolute and its violation is reversible error. In re Detention of J.S., 138 Wn. App. 882, 890-91, 159 P.3d 435 (2007). The trial court in Hassan's case committed reversible error by denying Hassan's motion to represent himself because (1) the request was unequivocal; (2) the request was not designed to delay trial, and (3) the court denied the motion without first properly exercising its discretion.

The controlling factors in deciding a defendant's motion to represent himself are whether the motion is knowing, unequivocal, and timely, that is, not exercised merely for a dilatory purpose. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Notably, a trial judge may not base a denial of a motion for self-representation on a finding self-representation "would be detrimental to the defendant's ability

to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel." State v. Madsen, 168 Wn.2d 496, 505, 229 P.3d 714 (2010).

a. Hassan's request was unwavering.

Hassan's request was unequivocal. He expressed his dissatisfaction with counsel and simply announced he would rather present his case himself than proceed with counsel with whom he did not communicate. RP 9/8/10) 3-5.

That Hassan may have been motivated to represent himself by dissatisfaction with counsel makes his request no less unequivocal. A clear request to proceed *pro se* does not become equivocal simply because the defendant is motivated by more than the single desire to present his own defense. State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), aff'd. on other grounds, 164 Wn.2d 83 (2008); see State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) ("Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver.").

Hassan's statements are distinguishable from cases in which defendants were found to have been equivocal in their alleged pro se motions. See e.g., State v. Woods, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001) (telling a trial judge he "will be prepared to proceed without counsel" in frustration with counsel's request for an eight-month trial continuance found to be mere expression of displeasure with his lawyer's request for a lengthy continuance), cert. denied, 534 U.S. 964 (2001); State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995) (accused's statements that he was "prepared to go for myself", he also stated, "I'm not even prepared about that", and "[t]his is out of my league for doing that" established frustration with delay in trial rather than an unequivocal assertion of his right to self-representation); State v. Garcia, 92 Wn.2d 647, 653, 600 P.2d 1010 (1979) (defendant who complained about attorney's performance and stated he did "not wish to have this attorney with me" was found to have asked for a new lawyer, not to proceed pro se).

Hassan informed the court he wanted to represent himself, his request came well before the trial date, and he did not request a continuance to prepare for trial. His request was unequivocal and should

have been resulted in further inquiry from the court. Hassan should not be penalized because the court aborted his request.

- b. Hassan knowingly sought to proceed pro se; any deficiencies in his showing of an intelligent waiver were attributable solely to the trial court.

A valid waiver of the constitutional right to counsel must be made knowingly, voluntarily, and intelligently. City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996). The favored method for determining whether a defendant validly waives the right to counsel is for the trial judge to question the defendant on the record to ensure he knows the risks of self-representation, the seriousness of the charges, the rules to be applied to the presentation of evidence and argument, and the maximum possible punishment upon conviction. State v. Lillard, 122 Wn. App. 422, 427-28, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005).

It is the trial court's obligation to inform the accused of the nature of the charges, the possible penalties, and the risks of self-representation. United States v. Keen, 104 F.3d 1111, 1120 (9th Cir. 1996). Put another way,

If a defendant seeks to represent himself and the court fails to explain the consequences of such a decision to him, the government is not entitled to an affirmance of the conviction it subsequently obtains. To the contrary, the defendant is entitled to

reversal and an opportunity to make an informed and knowing choice.

United States v. Arlt, 41 F.3d 516, 521 (9th Cir. 1994).

Applying this authority to Hassan's attempted invocation of his right to proceed pro se indicates reversal is warranted. Hassan made it clear he did not want to proceed with his assigned counsel, asserting doing so was against his constitutional rights. The trial judge twice asked Hassan whether he understood he had a constitutional right to "a lawyer." RP (9/8/2010) 5. It is apparent Hassan misunderstood the court's question, because he replied in a manner suggesting his constitutional right was not limited to that particular counsel and that he would "rather go pro se" than continue with counsel. RP (9/8/2010) 4-5.<sup>1</sup>

The judge then told Hassan he was not answering the question, and changed its wording a bit. Hassan said, "I don't, not like her." RP (9/8/2010) 5. Again, the answer indicates disagreement with the particular lawyer assigned to present Hassan's defense.

But at that point, the judge abruptly rejected Hassan's request to proceed pro se. This was wrong. Hassan's answers established that he knew he was entitled to assigned counsel. He merely did not answer in the

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<sup>1</sup> Hassan had enough trouble communicating in English that the trial judge assigned interpreters to assist him. RP (10/5) 87-90.

manner in which the judge apparently wanted. Rather than asking the same question repeatedly, the court should have covered the areas preferred by the Washington Supreme Court. By failing to do this, the court aborted Hassan's invocation of the right to represent himself.

Furthermore, the prosecutor made Hassan aware of the nature of the charges and the penalty, stating the charge was "possession with intent to deliver cocaine" and the sentence range was "60 to 120." RP (9/8/10) 4.

Less clear is whether Hassan recognized the need to know technical rules for the conduct of a trial. It may be reasonably inferred Hassan was generally aware of the justice system in Washington given his criminal history. This history would have been easily available to the court, because in the "Request for Bail" form attached to the information, the prosecutor set forth that among other criminal activity, Hassan had multiple drug convictions as well as a pending case. CP 2. See State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986) ("Whether there has been an intelligent waiver of counsel is an ad hoc determination which depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused."); State v. Vermillion, 112 Wn. App. 844, 857, 51 P.3d 188 (2002) (purpose of asking defendant about rules of evidence and other aspects of courtroom procedure "is not to

determine whether he has sufficient technical skill to represent himself. Rather, the purpose is to determine whether he fully understands the risks he faces by waiving the right to be represented by counsel . . . ."), review denied, 148 Wn.2d 1022 (2003).

The court was also aware of an earlier motion to discharge counsel presented by Hassan about one month earlier. CP 13; RP (9/8/10) 4. This indicates Hassan knew how to assert his rights in court and to speak up for them.

Finally, the case was not complex. Officers were "working a narcotic [*sic*] operation" that involved an undercover officer "looking for criminal activity specific to the International District." RP (10/5/10) 153. The officer approached and asked Hassan whether he had any crack cocaine. Hassan asked the officer if he had any money. The officer said he would have to get money and come back, but wanted to see the crack first. Hassan produced a clear plastic baggie containing several white rocks that resembled crack cocaine. RP (10/5/10) 154. The officer alerted colleagues, who arrested Hassan. RP (10/5/10) 108-10, 154-56. A search incident to arrest revealed a baggie of suspected crack cocaine in Hassan's jacket pocket. RP (10/5/10) 109-10.

Reflecting the relative simplicity of the case, the state called only the undercover officer as a witness at the CrR 3.6 hearing and the defense none. RP (10/4/10) 9-50. Hassan waived his right to a jury, thereby eliminating the need for instructions. CP 14. At trial, the state called three witnesses in addition to the undercover officer. RP (10/4/10) RP (10/4/10) 101-89. The testimony of two of those witnesses, one of whom was the crime lab analyst who tested the cocaine, spanned only 20 transcript pages. RP (10/4/10) 169-189.

The validity or not of the defendant's waiver of the right to be represented by counsel depends on the facts and circumstances of each case; "there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant." DeWeese, 117 Wn.2d at 378. A defendant who desires to proceed pro se "need not demonstrate technical knowledge of the law and the rules of evidence." State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). "The value of respecting this right [to self-representation] outweighs any resulting difficulty in the administration of justice." Madsen, 168 Wn.2d at 509.

The facts and circumstances here support a conclusion that Hassan knowingly and intelligently waived counsel and sought to proceed pro se

in a relatively uncomplicated case involving an area of the law of which he was intimately familiar. Even if this Court is unwilling to infer a knowing waiver on these facts, Hassan should not be punished, for the absence of a more thorough record on this point is attributable solely to the trial court's refusal to engage Hassan in the preferred colloquy.

The trial court's error was not "cured" at the October 4 hearing. Hassan confirmed he had asked to represent himself in earlier proceedings. RP (10/4/10) 6. As he had previously, Hassan said he disagreed with counsel's trial strategy and wondered how he could have a fair trial without witnesses on his behalf. He acknowledged "it would be hard," to proceed pro se, but emphasized he wanted his witnesses present for trial. RP (10/4/10) 6-7. From this exchange of information, the court concluded Hassan was not at that time moving to proceed pro se. RP (10/4/10) 7.

This intervention by the trial judge, made well after Hassan should have been allowed to represent himself, did not change the error in the earlier hearing. Indeed, Hassan reiterated his dissatisfaction with trial counsel's performance and announced he wanted witnesses called on his behalf. Hassan never explicitly withdrew his request to proceed pro se, and the trial judge never asked that specific question. Nor did the court

address any of the other preferred areas in determining the validity of a request to proceed pro se.

This Court reviews a trial court's denial of a request to proceed pro se for an abuse of discretion. Vermillion, 112 Wn. App. at 855. The failure to exercise discretion is itself an abuse of discretion. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). The judge at the September 8 hearing abused his discretion, thereby sabotaging Hassan's request by abruptly denying it in apparent frustration with the way Hassan answered the initial question. This was not the proper procedure and this Court should not condone it.

- c. Hassan's request was timely and not made for dilatory purposes.

In addition to being unequivocal, knowing, and voluntary, motions to proceed pro se must be timely made. In determining whether a request is timely, the trial court's discretion lies along a continuum corresponding to the time between the request and the start of trial and is expressed as follows.

The cases that have considered the timeliness of a motion to proceed *pro se* have generally held: (a) if made well before the trial or hearing and without an accompanying request to continue, the right of self-

representation stands as a matter of law; (b) if made as the trial or hearing is about to begin or shortly before, the trial court retains a measure of discretion to be exercised after considering the particular circumstances of the case; and (c) if made during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court. State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979).

Hassan made his request on September 8. At the time, the trial was set for September 29, and the speedy trial deadline was October 11. Supp. CP \_\_ (sub. no. 16, Trial Scheduling Order Waiver, filed 8/12/2010). This is well before trial. See, e.g., State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994) (defendant's request for trial, made five days before scheduled trial date, and three weeks before trial actually began, occurred "well before trial began," under Fritz's first category).

Importantly, Hassan requested no additional time to prepare for trial. See State v. Stenson, 132 Wn.2d 668, 770, 940 P.2d 1239 (1997) (strong evidence request to proceed pro se is made for dilatory purposes when it is accompanied by a motion to continue), cert. denied, 523 U.S. 1008 (1998); State v. Paumier, 155 Wn. App. 673, 687, 230 P.3d 212 (2010) (denial of request to proceed pro se, made after jury was selected

but before it was sworn and without an accompanying motion for continuance, was reversible error), review granted, 169 Wn.2d 1017 (2010); Vermillion, 112 Wn. App. at 856 (in reversing trial court's denial of defendant's request to present his own case, appellate court noted defendant "did not request that the trial be continued on any of the occasions that he renewed his motion. There is no indication in the record that Vermillion made his request for the purpose of delaying trial."); United States v. Price, 474 F.2d 1223, 1227 (9th Cir. 1973) (trial court abused discretion by refusing to permit defendant to proceed *pro se* where the "motion was made before the jury was sworn. The record contains no hint that the motion was a tactic to secure delay, and there is nothing that suggests that any delay would have attended the granting of the motion.")

In summary, considering all the factors set forth above, the trial court's denial of Hassan's motion to proceed *pro se* was an abuse of discretion and requires reversal of his conviction. Paumier, 155 Wn. App. at 687-88.

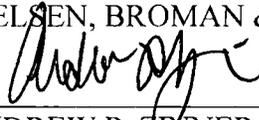
D. CONCLUSION

For the reasons stated, this Court should reverse Hassan's conviction and remand for a new trial.

DATED this 26 day of September, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66377-1-III
	)	
RASHID HASSAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26<sup>TH</sup> DAY OF SEPTEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RASHID HASSAN  
DOC NO. 725705  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2011.

x *Patrick Mayovsky*